

IN THE MATTER OF LICENSE NO. 317471
Issued to: Roy MILLER

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1670

Roy MILLER

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 29 November 1965, an Examiner of the United States Coast Guard at New York, N.Y. suspended Appellant's seaman's documents for two months upon finding him guilty of negligence. The specifications found proved allege that while serving as a pilot on board the United States SS SEATRAN GEORGIA under authority of the license above described, on or about 11 March 1965, Appellant, while his vessel was in the position of a burdened vessel as to SS CANDY in New York Harbor:

- (1) failed to take action to keep out of the way of CANDY;
- (2) crossed ahead of the privileged CANDY without reasonable cause;
- (3) failed to slacken speed, stop, or reverse; and
- (4) failed to sound a danger signal when the intentions of the other vessel were in doubt;

all contributing to a collision with CANDY.

At the hearing, Appellant was represented by counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of the master of CANDY, the pilot of CANDY, and the pilot of another vessel, and the stipulated testimony of the chief officer of GEORGIA.

In defense, Appellant offered in evidence his own testimony, that of two other Sandy Hook pilots who were witnesses aboard other ships, and that of an expert.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order suspending all licenses issued to Appellant for a period of two months.

The entire decision was served on 1 December 1965. Appeal was timely filed on 7 December 1965.

FINDINGS OF FACT

The Findings of Fact of the Examiner are adopted, subject to certain minor comments made later, as supported by substantial evidence, and are quoted in full.

"1. On 11 March 1965, the person charged herein, Roy Miller, was serving as pilot aboard the SS SEATRIN GEORGIA, a merchant vessel of the United States.

"2. The SEATRIN GEORGIA, hereinafter referred to as the SEATRIN (steam turbine), is a single screw freighter of 8325 gross tons, 485 feet in length, 63.8 feet breadth, 33.2 feet depth.

"3. At all pertinent times herein the person charged, who is also a Sandy Hook pilot, was the holder of License No. 317471, Issue 8-8, regularly issued to him by the U. S. Coast Guard qualifying him as master of steam and motor vessels any gross tons, bays, sounds and rivers and coastwise between Fire Island, New York and Barnegat, New Jersey and Pilot of steam and motor vessels any gross tons, New York Bay and Harbor to Yonkers, East River to Black Wells Island, Staten Island Sound and tributaries to South Amboy, New Jersey.

"4. On the early morning of 11 March 1965, the SEATRIN, drawing 24 feet 6 inches aft, sailing under enrollment, was bound from Texas City, Texas to Edgewater, New Jersey.

"5. On 11 March 1965 the SEATRIN, inbound in New York Harbor, was in collision with the SS CANDY, a liberty vessel of Panamanian registry, which, assisted by the Tug DALZELLATOM on her port bow, was enroute from her anchorage in Anchorage 21B, New York Harbor, bound for Port Newark, New Jersey for loading; the CANDY had a list to port of about a foot.

"6. At all pertinent times the clock of the CANDY was approximately seven minutes slower than that of the SEATRIN; the SEATRIN time will be used in this opinion, reference being made in brackets to the CANDY time.

"7. The collision occurred at about 5:37 a.m. [5:30 a.m. CANDY time] on 11 March 1965 about 500 yards west, northwest of Buoy 24.

"8. At all pertinent times herein the weather was dark but clear, tide ebb, wind northwest 30 to 35 knots

"9. On the early morning of 11 March 1965 Captain Dalland, master of the Tug DALZELLINE, boarded the CANDY at anchor in Bay Ridge Anchorage 21B from the Tug DALZELLATOM, which had brought him from Bay Ridge, Brooklyn, New York.

"10. At the time Captain Dalland boarded the CANDY, she was anchored in Anchorage 21B at a position where Bay Ridge Pier Light bore 145 degrees, Robbins' Reef Light 324 degrees and Governor's Island Extension Light 020 degrees true; the only other vessel in Anchorage 21B in the vicinity of the CANDY was northerly of her, a distance off of 300 yards.

"11. After Captain Dalland had boarded the CANDY on her starboard side, the Tug DALZELLATOM proceeded to the CANDY'S port bow where she was made fast.

"12. The CANDY AT anchor in the ebb tide and strong northwest wind heading about 300 degrees true riding on her port anchor, three shackles in the water; she was showing regulation anchor lights.

"13. At about 5:23 a.m. [5:16 a.m. CANDY time] on 11 March 1965, the CANDY'S anchor was aweigh, her engines been put on slow ahead at 5:14 a.m. and on stop at 5:16 a.m.

"14. At about 5:27 a.m. [5:20 a.m. CANDY time], the CANDY'S engines were put half ahead, five to seven knots, and a half a minute later full ahead, approximately nine knots, as she was proceeding through the anchorage on a westerly course southerly of Buoy 24, making for the Constable Hook Range of 275 degrees.

"15. As the CANDY was proceeding southerly of Buoy 24 and into the main ship channel at about 5:29 a.m. [5:22 a.m. CANDY time], Captain Dalland observed the lights of a vessel, which turned out to be the SEATRIN, coming up the main ship channel a good mile off bearing a little abaft the CANDY'S port beam; Captain Dalland believed that this vessel would pass under the stern of the CANDY.

"16. At 5:23 a.m. [5:16 a.m. CANDY time] on 11 March 1965, the SEATRIN, making 12 knots on a course of 342 degrees true inbound, passed under the Verrazano Bridge to her right of the

two vertical lights on the center of the span.

"17. As the SEATRIN proceeded inbound just northerly of Buoy 22, overtook and passed to her starboard the Grace Lines ship, SS SANTA MAGDALENA, who was in charge of Sandy Hook Pilot Captain Paul V. Burke; the SANTA MAGDALENA was on slow bell awaiting to take on a harbor pilot in the area of St. George, Staten Island, in place of Captain Burke preparatory to proceeding through the Kills.

"18. On the early morning of 11 March 1965, the M/S TRATENFELS, a ship of German registry piloted by Sandy Hook Pilot Captain William J. Walsh, was in Staten Island Anchorage 23, off Piers 10 - 11, Stapleton, Staten Island.

"19. Shortly before 5:30 a.m. [5:23 a.m. CANDY time], the TRATENFELS bound for Pier 3, Erie Basin, weighed anchor in order to follow the SEATRIN, which was then in the area of Buoy 22.

"20. As the TRATENFELS was underway in Anchorage 23, Pilot Walsh observed a vessel, which later proved to be the CANDY, getting underway in the north center of Anchorage 21B swinging to show a broad port light; at this time the SEATRIN was abeam of Buoy 22.

"21. At 5:33 a.m. [5:26 a.m. CANDY time], the engines of the SEATRIN were reduced from 85 to 75 revolutions, changing her speed from 12 to 11 knots.

"22. Although the red running lights and range lights of the Candy and of the DALZELLATOM had been observed by Pilot Walsh, a distance off of more than a mile, the person charged observed the red light of the CANDY as she was proceeding out of Anchorage 21B on a westerly course in the vicinity of Buoy 24 when the SEATRIN was below Wreck Buoy 22A, a distance off from the CANDY of a half a mile bearing about four points on the SEATRIN'S starboard side.

"23. The red running light and range lights of the CANDY were not observed by the watch officer of the SEATRIN, Mr. Gresham, until the CANDY was about a half a mile off, shortly after passing Buoy 22A when the SEATRIN had started to swing to her right.

"24. As the SEATRIN was proceeding inbound and was in the vicinity of Buoy 22, the person charged and the watch officer of the SEATRIN observed a New York City ferryboat, not otherwise identified, departing St. George bound, "at a good clip", for the Whitehall Street Terminal in Manhattan; the

course of the ferryboat would bring it across that of the SEATRIN from port to starboard.

"25. As the SEATRIN proceeded on her way, the ferryboat, not otherwise identified, crossed the SEATRIN to port, a distance off of 200 to 300 feet.

"26. As the CANDY was proceeding across the main ship channel, Captain Dalland observed the same New York City ferryboat, hereinbefore referred to, proceeding from St. George bound for Manhattan.

"27. The CANDY continued to proceed at a speed of full ahead, about nine knots, across the main ship channel, until about 5:35 a.m. [5:28 a.m. CANDY time] when Captain Dalland reduced her speed to half ahead and a half a minute later to slow ahead, 2 to 3 knots, in order to permit the ferryboat, although it was the burdened vessel in a crossing situation, the opportunity to cross the bow of the CANDY; Captain Dalland took this action because he stated in effect that ferryboats did not reduce their speed and he was not going to get tangled up with one.

"28. From the time that the lights of the SEATRIN were observed by Captain Dalland, as the CANDY was proceeding westerly in the area of Buoy 24, no one aboard the CANDY kept the SEATRIN under a constant observation.

"29. As the ferryboat crossed the bow of the CANDY from port to starboard, a distance off of 300 to 400 yards, Captain Dalland glancing to his left, observed the green light of the SEATRIN herself bearing about three points on the CANDY's port side and proceeding up on the CANDY's port side, an distance off of approximately 200 yards; at about the same time he heard a two-blast signal from the SEATRIN.

"30. At about 5:36 1/2 a.m. CANDY time, Captain Dalland ordered the engines of the CANDY full astern and blew a two-blast signal intending it, not as a reply to the two-blast signal of the SEATRIN, but, unbeknownst to the person charged, to inform the captain of the Tug DALZELLATOM to reverse the tug's engines; he put the CANDY's wheel hard right.

"31. When the SEATRIN was approximately one-half mile from the CANDY, which was then proceeding from the anchorage southerly of Buoy 24, the person charged having observed the CANDY's red running light, put the wheel of the SEATRIN somewhat to the right in order, as he put it, to give the

CANDY further room to maneuver from the anchorage.

"32. Although the wheel of the SEATRIN had been placed somewhat to the right, the person charged observed that the bearing between the CANDY and the SEATRIN was closing, whereupon at a distance off of 200 to 300 yards from the CANDY, he put the wheel of the SEATRIN 20 degrees to the left.

"33. When the vessels were about 700 feet apart, the person charged blew a two-blast signal to the CANDY; upon hearing a two-blast signal from the CANDY, intended for the Tug DALZELLATOM, the person charged put the wheel of the SEATRIN hard left, an action which was cooperated in by the Captain of the SEATRIN who, shortly before, had come on the bridge; as the vessels were coming together the SEATRIN's wheel was put to the right to swing the SEATRIN away from the CANDY.

"34. As Captain Kelly, master of the DALZELLATOM, observed that the SEATRIN was going to collide with the CANDY, he had his deckhand let go the line between his tug and the CANDY so that the tug would not be squeezed.

"35. At approximately 5:37 a.m. 5:30 a.m. CANDY time, the starboard bow of the SEATRIN, which was still swinging to her left, came into contact at about a 45-degree angle with the port bow of the CANDY, whose wheel had been put hard right and her engines full astern.

"36. As a result of the collision, both vessels sustained damage; no injuries or loss of life among any of the personnel aboard either vessel was indicated.

"37. The engines of the SEATRIN could have been slowed or they could have been put full astern and the vessel stopped within the distance of at least one-half mile without any danger being created to the SEATRIN.

"38. The CANDY had no lookout stationed on the bow; her watch officer was on the bridge stationed on the starboard side and did not see the approach of the SEATRIN until he heard her two-blast shortly before the collision.

"39. No danger signals were blown by the CANDY or the SEATRIN.

BASES OF APPEAL

This Appeal has been taken from the decision of the Examiner.

It is contended:

- (1) The Government failed in its burden of proof to show that a crossing situation existed between SEATRAN GEORGIA and CANDY on the morning of March 11, 1965.
- (2) The Government failed in its burden of proof (Article 21) to show that CANDY maintained her course and speed and was being navigated as a privileged vessel with respect to SEATRAN GEORGIA.
- (3) Additional Errors as to Hearing Examiner's Finding of Fact.
- (4) The Hearing Examiner's Opinion sets forth facts, purportedly gleaned from the testimony of the witnesses at the hearing, which are clearly erroneous.
- (5) Comments on hearing Examiner's Conclusions of Law.

APPEARANCES: Edward R. Downing, Esq., New York City; and New York and New Jersey Sandy Hook Pilots' Association, as amici curiae.

OPINION

I

Appellant first argues that a crossing situation was not established by the evidence. This assertion is somewhat weakened by certain other allegations in Appellant's brief, particularly when he attempts to invoke the "statutory fault" rule.

After pointing out the term "privileged vessel," taken by itself, is somewhat misleading to the uninitiated and that the privileged vessel has its burdens, Appellant says:

"It is settled law that in a situation such as was here presented, SEATRAN GEORGIA was not required to anticipate that CANDY would negligently and repeatedly breach her statutory duty, and, therefore, she had the right to assume, in her maneuvers, to regard this as one of Special Circumstance, and certainly not one of Privileged/Burdened situation." (Brief-6)

There seems to be no logical connection between the premise and the conclusion. If CANDY had a statutory duty it was either to maintain course and speed or to stand clear. Since CANDY was on the starboard hand of GEORGIA the "statutory duty" could not have been to stand clear; thus it must have been to maintain course and speed as a privileged vessel in a crossing situation.

Appellant's conclusion quoted above would seem to mean that when a burdened vessel finds a privileged vessel not abiding by the rules it is entitled to consider that the situation has been changed to one of special circumstance. But this is not to say that the crossing situation was not established in the first place.

Appellant further complains that CANDY disregarded the rules not only as to GEORGIA but as to a ferry. (Brief-9). He quotes testimony of the pilot of CANDY to the effect that he slowed down to let a ferry on his port side cross ahead of him. This pilot admitted that he did so not in accordance with any rule but because it was his personal feeling that ferries do not give way and he did not "want to have any collision with any of the ferryboats."

This contention of Appellant "proves too much." When it is recalled that both the ferry and GEORGIA were on CANDY's port hand, it is obvious that if CANDY was privileged as to the ferry in a crossing it was also privileged as to GEORGIA.

Apart from these implicit concessions in Appellant's brief it may be said that there is substantial evidence to support the Examiner's finding that with CANDY on a generally westerly track and GEORGIA on a northerly track there was established a crossing situation with CANDY the privileged vessel.

It is not necessary that a vessel be on an absolutely unswerving course at an absolutely unchanging speed to find it privileged in a crossing situation. U.S. v SS SOYA ATLANTIC, CA 4 (1964) 330 F 2nd 732.

The evidence was sufficient to establish and the actions of Appellant at the time confirm, that a crossing situation existed. Seeing CANDY's red light on his starboard bow, Appellant sounded two blasts. Under the circumstances this could only have been a proposal for a crossing contrary to the rules. At another point, as will be mentioned again later, Appellant declared that he came right slowly "in order to give CANDY more water to maneuver from her anchorage." Since CANDY was to the right of Appellant at the time, the only way Appellant's coming right slowly would give CANDY "more water" would be for Appellant to go astern of CANDY. This also is a recognition that CANDY was privileged to cross ahead.

Appellant's first point, that a crossing situation was not established, is without merit.

II

Appellant's second point argues that there is a burden on the Investigating Officer to prove that a statutory fault of a vessel in collision not only did not but could not have contributed to the collision before a pilot or master of the other colliding vessel can be found negligent in a proceeding under R.S. 4450.

Appellant says:

"In a cause of collision, the Government must prove both care on its own part and want of it on the part of the person charged. (The Clara, 102 U.S. 200). Generally, and in respect to CANDY where a vessel has been guilty of departure from the rules or of other fault, and in this case of the statutory fault of CANDY, which is clearly demonstrated by the testimony in the Government's case against SEATRAN GEORGIA, the Government must show that CANDY's fault was not a contributory fault, and on this point, the Government has the burden of going forward with such evidence under the rule of the Pennsylvania, 86 U.S. 125."

This is a complete misconception of the proceedings in hand. The Government is not called upon to "prove . . . CARE on its own part . . ." because the "Government" was not a party to the collision. Nor is this a case "against SEATRAN GEORGIA;" it is against the Appellant's license and his privilege to operate thereunder.

Appellant's reference to the Clara is footnoted by a statement that the underscoring was supplied. Supplying underscoring intimates that a quotation has been given, but no quotation marks were used. What the Clara actually says is:

"In a cause of collision, the plaintiff, in order to recover entire damages, must prove both care on his part and want of it on the part of the defendant." (Underscoring supplied.)

Obviously, since there are "both-to-blame" collisions, both pilots are at fault in such collisions. Appellant's theory means that no action under R.S. 4450 could be taken against either pilot for his negligence. This, of course is not true.

III

Appellant's third point is that certain specific findings of the Examiner were erroneous.

(i)

As to Finding #32, Appellant argues that the finding that the bearing of CANDY was moving left is contrary to what Appellant told a Board of Pilot Commissioners when he said that the bearing was "broadening on our starboard bow." (This testimony was allowed in evidence in Defense Exhibit "A"). Appellant's own testimony before the Examiner was (and Appellant refers me specifically to this):

"Q. When after you first saw the red light, were you aware as to what the CANDY was doing in respect to her navigation?

"A. I was aware that its bearing wasn't opening as rapidly as it did when I was down at the wreck buoy."

The Examiner was justified in rejecting Appellant's testimony that he saw CANDY's bearing always moving to the right. If Appellant had, as he testified, kept CANDY under continuous observation during this time, he could not have seen a bearing always moving right because then he would have crossed ahead.

The Examiner's finding, nevertheless, could be justified as a reasonable inference from Appellant's own assertions. If Appellant kept CANDY under continuous observation and if he is to be heard to say that from his observations he had reason to believe that CANDY would cross ahead while he would go astern of CANDY, but that his expectation was defeated by CANDY's slowing down, he must in fact have seen CANDY's bearing moving left and then stopping.

On the other hand, Appellant first saw CANDY's red light four points on his bow. When the master of SEATRAN GEORGIA looked at CANDY at the time of the two blast signal, CANDY was still four points on the bow (R-153). A proper finding based on this evidence would be that Appellant had in fact observed no change of bearing.

If the Examiner made an error in Finding #32, the permissible finding of unchanging bearing and collision courses is more damaging to Appellant.

(ii)

On Finding 35, Appellant argues that the Examiner was wrong in holding that GEORGIA was hit on the starboard bow because there is

evidence that it was struck abaft the beam or on the quarter. Assuming error, arguendo, it was immaterial where the contact was made in this case.

(iii)

Appellant disputes Finding 37 as to the stopping capability of GEORGIA and asserts that there is no evidence to support it. Assuming, again arguendo, that the speed and conditions of load of GEORGIA rendered it impossible for the vessel to have slowed or stopped without danger to itself, the matter is irrelevant. It does Appellant no good to argue that his vessel could not have been slowed or stopped without danger to itself if that inability actually led it into collision. Actually, when asked whether he could have stopped with safety when he saw CANDY at one half mile, Appellant testified that he could have backed full. (R 194).

IV

Appellant's fourth point raises a series of disputes as to the Examiner's findings. Since, in essence, these findings are supportable on the record and by reasonable inference therefrom, there is no need to examine each of the disputes in detail. The overall situation would not be changed anyway.

Illustrative of the disputes is this one. The Examiner stated in his Opinion that Appellant put his wheel to the right "to give the CANDY more room to proceed from the anchorage." Appellant argues that the Examiner is wrong, because what he actually said was that he ordered right rudder on GEORGIA to bring the vessel around slowly "in order to give the CANDY more water to maneuver from her anchorage." The difference in language provides no distinction.

Since Appellant changed course to his right in deference to a vessel on his right, it does not matter whether he did so to give the other vessel "more room" or "more water."

Appellant would have me believe that the turn to the right was executed not because GEORGIA was burdened but because GEORGIA wanted to go right anyway, and therefore did so slowly so as not to embarrass the other vessel.

Even if the argument is taken at face value, however, it undermines Appellant's position on appeal. If it were true that he had no burden as to the vessel on his starboard hand, there is no logical reason why he would have made a slow turn to the right rather than a more rapid turn to the right unless he had recognized the right of the other vessel so to maneuver. The Examiner's

conclusion that this very evidence supports the view that Appellant recognized his duty to stand clear as a burdened vessel is unimpeachable.

V

Appellant's fifth point is that the starboard hand rule for crossing situations was not established to have been applicable to this situation. In further refinement, Appellant has contended, with amici curiae to assist, that the controlling factor in this case should be that when a vessel is moving from an anchorage in New York Bay onto and on a course which requires it to cross a major ship channel the "crossing" rule is automatically suspended and the "special circumstance" rule alone applies.

On refinement of the issues, Appellant practically concedes that this is the only issue.

Several witnesses were brought before the Examiner to testify that the condition described in this case was, or should have been considered, a "special circumstance."

Appellant has, however, cited one case which I consider in point. In the cited case the "starboard hand" vessel was coming out of an anchorage. The "port hand" vessel was in a main channel."

The court said,

"The Pawnee proceeded down about mid-channel with the master and first officer in the pilot house, a sailor at the wheel, and a lookout stationed forward. She observed the Socony No. 5, appellant's steam tug, with two barges made fast, one on each side. This flotilla was proceeding out from the anchorage ground below the Statue of Liberty. The Pawnee blew two blasts to the No. 5, and was immediately answered by with two. This exchange of signals indicated a passing agreement, and the Pawnee, the burdened vessel, continued on. The Socony No. 5, CA 2 (1922) 285 Fed. 154, cert, dem. 261 U.S. 616 (Underscoring supplied.)

It is quite clear that while in that case the privileged vessel yielded right of way to the burdened vessel and was consequently held at fault for not having yielded enough, the court saw that the situation was initially a crossing situation under the

Rules. The opinions of Appellant's expert witnesses cannot alter the law nor can they retroactively alter the meaning of Appellant's actions at the time, which constituted a recognition that he was in a crossing situation.

This, of course, is not the forum for seeking a change in the rules.

VI

(i)

Ordinarily, it would be enough to consider Appellant's five points, as has been done, and dispose of the matter. However, consideration of these points reveals a bewildering display of inconsistencies weaving through all five, and some notice must be taken of them.

Underlying Appellant's arguments are two positions. One is that he signaled CANDY so that he could cross ahead and he did so try to cross ahead in reliance upon CANDY's agreement with two blasts; thus CANDY's failure to come left was the sole cause of the collision. The other position is that he had earlier taken adequate action to have permitted CANDY to have crossed ahead of him and that CANDY's slowing down in front of him forced him to act in extremis.

Appellant cannot maintain both of these positions at the same time, and the record amply demonstrates that he cannot maintain either of them so as to make CANDY solely liable and himself faultless.

Several elements of Appellant's brief and of the record must be considered here.

(ii)

Appellant contends at the same time that the crossing rules do not apply and that CANDY violated those rules by slowing down. At one point he declares:

"As SEATRIN GEORGIA was proceeding up the main ship channel, in the area of Buoy 22, ferry left Staten Island bound for Manhattan, crossing SEATRIN GEORGIA's port bow, and later was permitted to cross CANDY's port bow by Pilot Dalland because ferry boats do not reduce speed and only the Hearing Examiner regarded the ferry boat as the burdened vessel in a crossing situation with

CANDY (Findings 25 and 27 . . .)" (Brief-3,4).

This can only be taken to imply that of all parties concerned only the Examiner saw a relationship of "privileged" and "burdened;" Pilot Dalland, the ferry, and Appellant did not.

However, as mentioned before, Appellant states that Pilot Dalland disregarded "The Inland and Pilot Rules in respect to CANDY's navigation not only to the GEORGIA, but to the ferry boat" (B-9, 10).

Appellant also states:

" . . . Dalland testified that but for the fact that he was navigating the CANDY with respect to a ferry boat ahead, as a result of which he slowed CANDY, despite the fact the CANDY was the privileged vessel, he would have passed ahead of SEATRIN GEORGIA." (Brief-14). (Underscoring supplied). The underscored words are Appellant's own conclusion as to the situation.

These observations serve to emphasize that every reference of Appellant condemning CANDY's navigation with respect to the ferry "statutory fault" with respect to its obligations to SEATRIN GEORGIA implicitly admits the application of the "starboard hand" rule. CANDY could not be required to maintain course and speed with respect to SEATRIN GEORGIA unless CANDY was a privileged vessel.

(iii)

Appellant's claimed maneuvers also bear scrutiny. He was coming right slowly on five degrees rudder, to allow CANDY "more water." But then, according to Appellant, he shifted the rudder to twenty degrees left, sounded two blasts, heard two blasts, went hard left, and went right to fishtail. One must infer from the known facts what Appellant must have seen when he decided to come left. He did not see a red light on his port hand or even dead ahead or he would not have come left. It may be inferred that he saw what the master saw, a vessel broad on his bow.

Appellant maintains that during the time in question he kept CANDY under continuous observation. He maintains also that there is no evidence that he saw CANDY's bearing moving toward his bow. At the same time he maintains that had CANDY not slowed in front of him he would have passed astern of CANDY.

This last contention can be predicted only upon observations by Appellant, despite his testimony, that CANDY's bearing had been in fact drawing forward so as to indicate that CANDY would cross, then that CANDY's bearings were ceasing to move forward so that he could not count on safely passing astern.

Appellant creates for himself this dilemma; either he continuously had CANDY under observation, in which case he is chargeable, on his own argument, with knowing that CANDY's bearing had moved forward and then stopped moving across ahead of him because of CANDY's slowing down, or he did not have CANDY under observation at all during the interval between his first sighting of the red light and his panicked decision to go left.

The truth is not to be found either in Appellant's testimony or in his argument. But whichever horn of this self-imposed dilemma he chooses, he is at fault.

If he truly observed the movements of CANDY, and thus saw a vessel moving across his bow, then slowing down so as to embarrass him, his failure to act until a mere 700 feet separated them was a fault. If, on the other hand, he did not keep CANDY under observation but suddenly was confronted by a vessel dangerously close ahead of him, he is still at fault.

But Appellant cannot be heard to say simultaneously that he kept CANDY under observation at all times and never saw a bearing movement forward on his bow, and that he assumed from CANDY's movement that CANDY would cross ahead until CANDY's slowdown upset his calculations.

(iv)

Another self-created dilemma faces Appellant. If he would have it that he attempted to cross ahead on reliance on CANDY's "agreement" to his two blast signal, he acknowledges the applicability of the "starboard hand" rule and does not explain why the distance had closed to 700 feet before he made his proposal. If he claims "need to act" he cannot:

- (1) claim, as his brief does, that he always had CANDY under observation but never saw the bearing change other than to "open," nor
- (2) claim that a danger signal was not called for at that point.

(v)

Appellant cannot, by inaccurate testimony and inconsistent argument, befog an issue so that an Examiner's findings of fact must be set aside.

CONCLUSIONS

The Examiner's findings of fact, supported by adequate evidence, bring this case within the crossing rule.

Appellant was at fault in failing to follow the precepts of the crossing rule. He was also at fault in not perceiving the need to sound a danger signal.

Because of the complexity of the reviewing process in this case, it is considered in the interest of equity that the suspension ordered should not be required to be served, although Appellant's fault has been established.

ORDER

The Findings and Order of the Examiner entered at New York, New York, on 29 November 1965 are approved, but the suspension ordered is hereby REMITTED.

W. J. SMITH
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 24th day of November 1967.

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